



Billing Code 3410-90

DEPARTMENT OF AGRICULTURE

Office of the Secretary

[0503-AA51]

Revocation of Statement of Policy on Public Participation in Rule Making

AGENCY: Office of the Secretary, USDA.

ACTION: Revocation of Statement of Policy.

SUMMARY: The U.S. Department of Agriculture (USDA) is revoking the Statement of Policy titled “Public Participation in Rule Making,” published in the Federal Register on July 24, 1971 (36 FR 13804), which required agencies in USDA to follow the Administrative Procedure Act’s (APA) notice-and-comment rulemaking procedures in situations where the APA does not require it. The Statement of Policy implemented a 1969 recommendation by the Administrative Conference of the United States (ACUS), which urged Congress to amend the APA to remove the exemption from the notice-and-comment requirement for rulemakings relating to “public property, loans, grants, benefits, or contracts,” adding that agencies should follow the notice-and-comment procedures pending amendment of the APA. By revoking the 1971 Statement of Policy, USDA restores the discretion to use notice-and-comment procedures when appropriate, unless otherwise required by law, with regard to this class of rulemakings. This action also improves USDA’s ability to implement programs efficiently.

DATES: Effective date: **[Insert date of publication in the FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

On June 3, 2013, USDA published for comment a notice (78 FR 33045) proposing to rescind a 1971 Statement of Policy, published in the Federal Register on July 24, 1971 (36 FR 13804), which required all USDA agencies to follow the public participation requirements of the APA (5 U.S.C. 553(b) and (c)) in rulemaking relating to public property, loans, grants, benefits, or contracts, even though the APA specifically exempts that class of rulemakings from such public participation requirements. The Statement of Policy further provided that any “good cause” finding under 5 U.S.C. 553(b)(B) of the APA would be used “sparingly” and “only where there is a substantial basis therefor.” The comment period closed on July 3, 2013. In response to the proposal, USDA received comments from two entities.

The first commenter, a member of the public, objected to a statement in the “Summary” section of the notice, which stated that revocation of the Statement of Policy “would not result in USDA forgoing notice-and-comment rulemaking for all regulatory actions relating to public property, loans, grants, benefits, or contracts, rather the proposed change would grant USDA agencies the discretion to determine the appropriateness of notice-and-comment rulemaking for this class of rulemakings.” The commenter asserted that “appropriate” is a subjective term and suggested that what an agency might view as an inappropriate situation for using notice-and-comment procedures might be viewed by the public as an appropriate situation. For the reasons discussed below, USDA is not making any changes in response to this comment.

USDA notes that this action merely restores to USDA agencies the discretion already afforded by the APA. The APA does not require the use of notice-and-comment procedures for rulemakings relating to public property, loans, grants, benefits, or contracts. If another statute requires the use of such procedures (for example, section 22 of the Office of Federal Procurement Policy Act, 41 U.S.C. 1707, which has specific notice-and-comment requirements for the issuance of agency procurement policies, regulations, procedures, and forms), USDA would use those procedures. Similarly, if a USDA agency determines that the benefit of affording the public a pre-implementation opportunity to comment on program rules is not outweighed by other considerations (for example, by the public benefit of awarding Federal assistance as soon as practicable), then the agency may use the discretion afforded by the APA to use notice-and-comment procedures even though not required by the APA.

The second commenter, the Humane Society of the United States (HSUS), urged USDA to continue to follow the APA's notice-and-comment procedures for regulatory actions relating to public property, loans, grants, benefits, or contracts, as required by the 1971 Statement of Policy. HSUS organized its comments into two broad categories: (1) harm to the public; and (2) problems with the claimed bases for the proposed action. For the reasons discussed below, USDA is not making any changes in response to these comments.

With respect to the first category of comments, HSUS asserted that revocation of the 1971 Statement of Policy would lead to less informed rules that need not be responsive to public input, make it more difficult for the public to challenge rules under the APA, and substantially reduce accountability and transparency, citing to several Federal court decisions

discussing the importance of notice-and-comment procedures. The commenter further noted that “[t]his cuts to the heart of the APA’s purpose and would deprive the public and courts of important information needed to ensure a properly functioning government.”

Because this action merely restores to USDA agencies the discretion already afforded by the APA, USDA does not agree with the commenter’s arguments that revoking the Statement of Policy is somehow contrary to the purpose of the APA. By this action, USDA is merely implementing a policy of no longer requiring agencies to follow procedures that the APA itself does not require. USDA also reiterates its commitment to transparency and open government, as explained in the June 3, 2013 notice (78 FR 33045, 33046 – 33047).

HSUS also asserted that applying this new policy to activities of the Wildlife Services (WS) division of USDA’s Animal and Plant Health Inspection Service (APHIS) is inappropriate in light of recent public and congressional scrutiny of APHIS/WS activities, as it would further reduce transparency and accountability. The commenter made a similar assertion with respect to the meat purchasing activities of USDA’s Agricultural Marketing Service (AMS).

In revoking the 1971 Statement of Policy, USDA is not identifying specific regulatory activities for which an agency will choose to forgo notice-and-comment rulemaking in the future. At the same time, USDA is not singling out certain agencies or activities to which the new policy will or will not apply. Consistent with the APA, all USDA agencies, including APHIS and AMS, will have the discretion to determine the appropriateness of using the APA notice-and-comment procedures for rulemakings relating to public property, loans, grants, benefits, or contracts, except where specifically required by law.

With respect to the second category of comments, HSUS questioned one of the bases identified in the June 3, 2013, notice for proposing to revoke the 1971 Statement of Policy. Specifically, USDA noted that the Statement of Policy had implemented a 1969 ACUS recommendation that Congress amend the APA to remove the exemption for rulemakings relating to public property, loans, grants, benefits, or contracts, and that agencies follow the APA's notice-and-comment procedures for such rulemakings pending amendment of the APA. USDA further noted that "[t]he 1971 Statement of Policy was issued in anticipation of legislative action that would have amended the APA to remove the exemption for such matters, but in the more than 40 years that have passed since the ACUS recommendation was adopted, Congress has not acted to implement the recommendation. USDA ascribes significant weight to this fact." See 78 FR 33045. The commenter objected to the fact that the notice did not explain why revoking the Statement of Policy is appropriate now versus earlier, considering that ACUS has not changed its position.

The fact that USDA is revoking the Statement of Policy now is based on a number of considerations as detailed in the June 3 notice, including, but not limited to, congressional inaction on the ACUS recommendation. By not implementing the ACUS recommendation, despite having ample time to do so, Congress has effectively chosen to leave the APA exemption in place.

HSUS also objected to the fact that the June 3, 2013, notice did not address all rulemakings since the Statement of Policy was issued in 1971 in order to determine the value of notice-and-comment rulemaking, but rather included a "cherry-picked handful of examples." According to the commenter, "that the costs of following notice-and-comment procedures may outweigh the benefits in some instances does not support a full revocation

of the Statement of Policy” (emphasis in original). The commenter also noted the availability of the APA’s so-called “good cause” exemption in 5 U.S.C. 553(b)(B), which permits agencies to forgo notice-and-comment procedures “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” The Statement of Policy preserved the “good cause” exemption but required that it be used “sparingly,” permitting its use “only when there is a substantial basis therefor.” See 36 FR 13804 (July 24, 1971).

The examples identified in the June 3, 2013, notice describe some recent situations where USDA has found that the use of notice-and-comment procedures prolonged program implementation without a corresponding benefit. See 78 FR 33045, 33046. The examples are not intended to be representative of the entire universe of regulatory actions for which USDA agencies might forgo notice-and-comment rulemaking, nor are they necessarily indicative of whether those agencies would forgo notice-and-comment rulemaking for those particular programs in the future. Again, USDA emphasizes that revocation of the 1971 Statement of Policy does not mean that USDA agencies will now be forgoing notice-and-comment rulemaking for all matters relating to public property, loans, grants, benefits, or contracts. Rather, agencies will no longer be required, as a matter of Departmental policy, to use notice-and-comment procedures for this class of rulemakings, except where otherwise required by law. Agencies will have the discretion to determine, on a case-by-case basis, when to afford the public an opportunity for notice and comment even where the APA does not require it. This action will allow USDA agencies to rely on the APA’s “public property, loans, grants, benefits, or contracts” exemption in 5 U.S.C. 553(a)(2), rather than having to

meet the requirements of the separate APA “good cause” exemption in 5 U.S.C. 553(b)(B), as narrowed by the “sparingly” and “substantial basis” qualifications in the Statement of Policy.

HSUS also objected to another basis identified in the June 3, 2013, notice for proposing to revoke the 1971 Statement of Policy. Specifically, USDA noted that revoking the Statement of Policy “acknowledges the reality that the public participates in much of the formulation of agency policies on financial and transactional programs through means other than by following the daily publication of the Federal Register.” USDA also reiterated its commitment “to transparency and to providing timely information to the public” by referring to a number of requirements applicable to Federal agencies to make certain information available to the public in prescribed formats. See 78 FR 33045, 33046 – 33047. The commenter suggested that revocation of the Statement of Policy would result in USDA no longer using the Federal Register, questioning whether USDA would make information on controversial topics available to the public.

USDA emphasizes that revocation of the Statement of Policy does not impact what constitutes a “rule” under the APA (see 5 U.S.C. 551(4)), nor does it affect the types of information that are required to be published in the Federal Register (see 5 U.S.C. 552(a)(1)). A final rule that did not go through notice-and-comment procedures will still be published in the Federal Register as required by the APA. Further, revocation of the Statement of Policy will not affect the requirements to make certain information available to the public in prescribed formats, such as Office of Management and Budget directives regarding announcements of funding opportunities. USDA remains firmly committed to informing the public of its activities.

Finally, HSUS asserted that other Web sites and online channels are generally not adequate substitutes for the APA's notice-and-comment procedures, noting that the APA, 5 U.S.C. 553(c), requires agencies to consider public comments on notice of proposed rulemaking. USDA agrees that the notice-and-comment process is a useful mechanism to foster informed decisionmaking. However, there have been, and likely will continue to be, situations where affording the public a pre-implementation opportunity to comment on a proposed rule is outweighed by other public benefits, such as issuing benefits or making payments to the public as soon as practicable. Revocation of the 1971 Statement of Policy allows agencies to consider the circumstances and make that determination.

Executive Order 12866

This action has been reviewed under Executive Order No. 12866 and has been determined not to be a "significant regulatory action." This action will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; nor will it materially alter the budgetary impact of entitlements, grants, user fees, or loan programs; nor will it have an annual effect on the economy of \$100 million or more; nor will it adversely affect the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities in a material way. Furthermore, it does not raise a novel legal or policy issue arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Regulatory Flexibility Act

USDA certifies that this action will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, Pub. L. No. 96-534, as amended (5 U.S.C. 601 et seq.).

Paperwork Reduction Act

This action contains no information collections or recordkeeping requirements under the Paperwork Reduction Act, as amended, (44 U.S.C. 3501 et seq.).

Revocation of Statement of Policy on Public Participation in Rule Making

USDA hereby revokes the Statement of Policy, published on July 24, 1971 (36 FR 13804), which required USDA to follow the public participation requirements of 5 U.S.C. 553(b) and (c) in rulemaking relating to public property, loans, grants, benefits, or contracts.

Done at Washington, DC, this 21st day of October, 2013.

Thomas J. Vilsack
Secretary of Agriculture

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